



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

February 2, 2004

Mr. Vic Ramirez
Associate General Counsel
LCRA
P.O. Box 220
Austin, Texas 78767-0220

OR2004-0713

Dear Mr. Ramirez:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 195474.

The Lower Colorado River Authority (the "LCRA") received a request for three categories of information related to the LCRA service area in certain watersheds located in Hays and Travis Counties. You state that some responsive information will be made available to the requestor. You claim that portions of the requested information are excepted from disclosure under sections 552.103 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We first address your responsibilities under the Act. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. You inform us that the LCRA received the request for information on November 6, 2003. While you submitted a portion of the specific information that was requested in a timely manner, you failed submit to this office copies or representative samples of the remaining specific information that was requested until

December 5, 2003, after the fifteen business day period specified by section 552.301(e). Thus, we find that the LCRA failed to comply with section 552.301 of the Government Code with respect to this remaining specific information.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301(e) results in the legal presumption that the information at issue is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). A compelling demonstration is made when a governmental body shows that the information at issue is confidential by law or its release would implicate a third party's interests. You claim that the information submitted to this office on December 5, 2003 is excepted from disclosure under section 552.111 of the Government Code. This exception is discretionary in nature, and serves only to protect a governmental body's interests and may be waived. As such, section 552.111 does not generally constitute a compelling reason to withhold information. *See Open Records Decision Nos. 677 at 10 (2002) (claim of attorney work-product privilege under section 552.111 or Texas Rule of Civil Procedure 192.5 does not provide compelling reason for purposes of section 552.302 if it does not implicate third party rights), 473 (1987) (statutory predecessor to section 552.111 may be waived); see also Open Records Decision No. 522 (1989) (discretionary exceptions in general).* Accordingly, we conclude that the LCRA may not withhold any portion of the information at issue that was submitted to us on December 5, 2003 under section 552.111 of the Government Code. As you raise no other exception to disclosure of this information, the information submitted to this office on December 5, 2003 must be released to the requestor.

We turn now to your arguments regarding section 552.103 of the Government Code for the remaining submitted information which was timely submitted. Section 552.103, known as the litigation exception, provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated

on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date that the governmental body receives the request for information and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, *writ ref'd n.r.e.*); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under 552.103(a).

To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. Open Records Decision No. 588 at 1 (1991). The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.¹ Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. Open Records Decision No. 638 at 3 (1996). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

In this case, you explain that the requested information relates to an expansion of the LCRA's service area in a portion of southwest Travis County. You state that an application to amend the LCRA's existing certificate of convenience and necessity will be filed with the Texas Commission on Environmental Quality. You advise that a previous application regarding the LCRA's proposed extension of service in other areas of southwest Travis County and northern Hays County resulted in a lawsuit filed by the requestor in which the LCRA was a party. However, in this instance, you do not inform us of any particular acts

¹In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

on the part of the requestor that indicate that she is preparing to file suit against the LCRA regarding this matter. Having considered your arguments and representations, we find, therefore, that you have failed to provide us in this instance with any "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." ORD 452 at 4. Because you have failed to establish that the LCRA reasonably anticipated litigation when it received this request, none of the submitted information may be withheld on the basis of section 552.103.

You also assert that the remaining submitted information may be withheld pursuant to section 552.111 of the Government Code. This section excepts from public disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." The purpose of this exception is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. See *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615 (1993), this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts only those internal communications that consist of advice, recommendations, or opinions reflecting the policymaking processes of the governmental body. See Open Records Decision No. 615 at 5.

A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; see also *City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. See Open Records Decision No. 631 at 3 (1995). Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. See Open Records Decision No. 615 at 5. If, however, the factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information may also be withheld under section 552.111. See Open Records Decision No. 313 at 3 (1982).

We have marked the information that the LCRA may withhold under section 552.111. Upon review of the remaining information at issue, we conclude that it does not contain advice, recommendations, or opinions reflecting the policymaking processes of the LCRA. Therefore, the LCRA may not withhold any of the remaining information under section 552.111.

In summary, we have marked the information that the LCRA may withhold under section 552.111. The remaining submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877)673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512)475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Cindy Nettles". The signature is fluid and cursive, with the first name "Cindy" written in a larger, more prominent script than the last name "Nettles".

Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 195474

Enc. Submitted documents

c: Ms. Melanie Oberlin
Save Our Springs Alliance
P.O. Box 684881
Austin, Texas 78768
(w/o enclosures)